Supreme Court, U. S.
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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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the State of Indiana, Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana, and the Indiana State Board of Education, a public corporate body, (hereafter State Defendants) submit their brief in opposition to the Petition for Writ of Certiorari filed herein. This Petition is one of six cases[1] brought to this Court to review a decision issued by the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) on July 16, 1976, in cause numbers 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007, which affirmed the Judgment of the United States District Court for Southern District of Indiana, Indianapolis Division (hereafter District Court) entered on August 1, 1975.

OPINIONS BELOW

The opinion of the Seventh Circuit issued on July 16, 1976, and the decision of the District Court entered on August 1, 1975, have not been officially reported, but may be found in Petitioners' Appendix A.

Other decisions by the District Court and the Seventh Circuit in the cause are 332 F. Supp. 655 (S.D. Ind., 1971), State Defendants Appendix in No. 76-515 p. A-118, (hereafter App. p. —), *aff'd.* 474 F. 2d 81 (7th Cir., 1973) (App. p. A-102), *cert. denied* 413 U.S. 920 (1973); 368 F. Supp. 1191 (S.D. Ind., 1973), (App. p. A-33), *aff'd.* 503 F. 2d 68 (7th Cir., 1974), (App. p. A-1), *cert. denied* 421 U.S. 929 (1975).

STATEMENT OF THE CASE

This Petition is an attempt to review an opinion issued by the Seventh Circuit on July 16, 1976, affirming, by

[1] Jurisdictional Statements were filed in Nos. 76-212, 76-458 and 76-468, and Petitions for Writs of Certiorari were filed in Nos. 76-515 and 76-522.

a divided Court, a decision of the District Court in a school desegregation case which ordered an interdistrict remedy to correct segregation previously found to exist only in the Indianapolis Public School system (hereafter I.P.S.). A complete statement of the case is set out in the State Defendants' Petition in No. 76-515.

Facts Material to Questions Presented

On August 18, 1971, the District Court issued its "Memorandum of Decision," 332 F. Supp. 655 (S.D. Ind., 1971) holding that I.P.S. was guilty of *de jure* segregation. The District Court's finding in that trial were that the I.P.S. school Board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within I.P.S.

On July 20, 1973, the District Court issued its second major decision in this case, 368 F. Supp. 1191 (S.D. Ind., 1973). In that Decision the Court refound the acts of *de jure* segregation on the part of I.P.S., and held that those acts were "imputed" to the Indiana State Board of Education and the Superintendent of Public Instruction. The Court also found that none of the other school corporations involved in this case[2] were guilty of any acts of *de jure* segregation. 368 F. Supp. at 1208-1210. That finding has never been contested by any party, including Petitioner herein, in these entire proceedings.

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[2] After issuance of the District Court's judgment on August 18, 1971, and the appeal thereof, the District Court allowed intervention by two children as alleged class representatives who named the remaining ten school corporations in Marion County, Indiana, and ten school corporations in the six counties surrounding Marion County, Indiana as added defendants.

REASONS FOR DISALLOWANCE OF THE WRIT

Petitioners acknowledge on page 26 of their Petition that they have not raised the question presented here in their appeal to the Seventh Circuit. Likewise, neither the United States nor the intervening Buckley Plaintiffs was an appellant in the Seventh Circuit, and therefore, did not raise these questions. Consequently, the attempted challenge herein of the District Court's remedy has never been briefed or argued to or decided by the Courts below.

Petitioners are thus taking a unique position in this Court in a lawsuit that was originally commenced against them by the United States on May 31, 1968. After the District Court found that Petitioners were guilty of *de jure* segregation within their own district, and after challenging that finding on appeal and then alleging, once the finding had been affirmed, that they could desegregate I.P.S. within that district, they now, in this Court and for the first time in eight and one half years of litigation, assert that the District Court should have ordered two way transfers of students instead of the one way transfer that they did not challenge, even though the other school corporations have been found not to have committed any acts of *de jure* segregation.

By this change of position the Petitioners are completely ignoring the legal deficiencies of the decisions by the District Court and the Seventh Circuit, and are attempting to raise new matters.

It is well settled that questions presented for review by this Court must properly arise in the record, *Tyrrell v. District of Columbia,* 243 U.S. 1 (1917), and must have been urged and briefed below, *California v. Taylor,* 353 U.S. 533 (1957); *Lawn v. United States,* 355 U.S. 339

(1958); *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967). Thus, the writ prayed for herein must be denied.

Even if the question of two way transfers had been properly raised below, that type of remedy would be completely inappropriate in this case.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1 (1971), this Court clearly established the power of a district court in a school desegregation case, stating at page 16:

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation* ...
>
> ... As with any equity case, the nature of the violation determines the scope of the remedy ..."

This Court emphatically reaffirmed that principle in *Milliken v. Bradley*, 418 U.S. 717 (1974), stating at page 744:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation ... *Before the boundaries of separate and autonomous school districts may be set aside by* consolidating the separate units for remedial purposes or *by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation ...*"

In the first trial of this cause the District Court found that I.P.S. was guilty of *de jure* segregation. The District Court reaffirmed that finding in the second trial, but expressly stated that none of the other separate and independent school districts involved therein was guilty of any *de jure* segregation. 368 F.Supp. at 1203. Thus, there was a violation in one school district, but no interdistrict violations, and *any* interdistrict remedy is therefore inappropriate whether it involves one way transfers or two way transfers.

CONCLUSION

For these reasons, the writ of certiorari prayed for should be denied.

Respectfully submitted,

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